

LARRY TOTTEN et al,	No	C-03-5030 VRW
Plaintiffs,		ORDER
v		
BLAIR EXCAVATORS, INC et al,		
Defendant.		

Rule 25(a)(1) provides that under certain circumstances a party may be substituted upon death; the rule requires that for "persons not parties" (such as Deborah Blair here), a motion under Rule 25(a)(1) must "be served * * * in the manner provided in Rule

1 4 for the service of a summons." Rule 4(e) provides that
2 service upon an individual from whom a waiver
3 has not been obtained and filed * * * may be
4 effected in any judicial district of the United
5 States:

6 (1) pursuant to the law of the state in
7 which the district court is located, or in
8 which service is effected, for the service
9 of a summons upon the defendant in an
10 action brought in the courts of general
11 jurisdiction of the State; or

12 (2) by delivering a copy of the summons
13 and of the complaint to the individual
14 personally or by leaving copies thereof at
15 the individual's dwelling house or usual
16 place of abode with some person of
17 suitable age and discretion then residing
18 therein or by delivering a copy of the
19 summons and of the complaint to an agent
20 authorized by appointment or by law to
21 receive service of process.

22 The proofs of service on Deborah Blair filed in this case
23 (Doc #36 Att 4, #37, #39) all identify 5241 Old Redwood Highway,
24 PMB #1, Santa Rosa, CA 95403 as the place of service. The papers
25 suggest that "PMB" stands for "private mail box" -- a rented
26 facility for receiving mail -- and indeed, located at 5241 Old
27 Redwood Highway is a business known as Larkfield Self Storage,
28 which one process server described as "a private mailbox rental
service." Doc #37. The papers suggest that this Larkfield Self
Storage was the only location at which personal service was
attempted. There is no indication that Larkfield Self Storage is
Deborah Blair's usual dwelling place, her place of business or, for
that matter, somewhere she frequents.

The foregoing details about plaintiffs' attempts at
service reveal that Rule 4 (and thus Rule 25(a)(1)) has not been
satisfied. There is no waiver of service pursuant to Rule 4(d).

1 There has been no personal service or service at Deborah Blair's
2 "dwelling house or usual place of abode" pursuant to Rule 4(e)(2).
3 And California's rules for service of process (incorporated by FRCP
4 4(e)(1)) provide that service at a "usual mailing address" is
5 effective only "[i]f [papers] cannot with reasonable diligence be
6 personally delivered to the person to be served." Cal Civ Pro Code
7 § 415.20(b). Giving up on personal service after repeatedly
8 visiting one location (the self-storage facility) where the party
9 to be served is unlikely to be found does not constitute
10 "reasonable diligence." See Doc #36 Att 4 (mail service only to
11 5241 Old Redwood Highway); Doc #37 (hand delivery to 5241 Old
12 Redwood Highway); Doc #39 (repeated attempts at service all made at
13 5241 Old Redwood Highway).

14 Accordingly, the court finds that plaintiffs have failed
15 to comply with Rule 25. But this is not grounds for denying the
16 motion with prejudice, for plaintiffs have 120 days under Rule 4(m)
17 in which to effect proper service of their motion to substitute.
18 The motion to substitute (Doc #36) is therefore DENIED WITHOUT
19 PREJUDICE to plaintiffs renoticing the motion if and when they
20 succeed in serving Deborah Blair. The court admonishes plaintiffs,
21 however, that it will not extend the time for service under Rule
22 4(m), and a failure to effect service within 120 days of the April
23 13, 2005, filing of plaintiffs' motion to substitute will result in

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1 dismissal of the claims against Victor Blair pursuant to the third
2 sentence of FRCP 25(a)(1).

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4 IT IS SO ORDERED.

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7 VAUGHN R WALKER
8 United States District Chief Judge
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